IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 14/01/2003

Coram

THE HONOURABLE MR. JUSTICE M. KARPAGAVINAYAGAM
and
THE HONOURABLE MR. JUSTICE A.K. RAJAN

CRIMINAL APPEAL No.1051 of 1998
and
Crl.M.P.No.235 of 2003

1. Joser @ Ponnusamy
2. Bhaskaran @ Basker
3. Karuppiah
4. Murugan
5. Sampath @ Sampathkumar .. Appellants

-Vs-

State (Inspector of Police).
Jeeyapuram Police Station.
(Cr.No.232/94). .. Respondent

Criminal Appeal against the conviction and sentence imposed in S.C. No.169 of 1997 on the file of the II Additional Sessions Judge, Tiruchirapalli, dated 4.11.1998.

For Appellant-1 : Mr. J.I.Rajkumar Roberts

For Appellant-2 : Mr. R.Sankarasubbu

For Appellants
3 to 5 : Mr. A.Padmanabhan

For Respondent : Mr. E. Raja, Addl. P.P.

:JUDGMENT

M. KARPAGAVINAYAGAM, J.

On 11.7.1993, one Thennarasu, the son of A1 Joser alias Ponnusamy was murdered by Balu alias Balachandran, the deceased and his brother Sathasivam.

In respect of this incident, a case was registered against both of them and the investigation was pending. During that time, the deceased Balu alias Balachandran came out on bail. In retaliation to the said murder, the accused 1 to 5 wanted to take revenge. On 2 3.4.1994 at about 10.30 a.m., Balu alias Balachandran, the deceased was proceeding towards his plantain grove. The accused 1 to 5 came with aruvals and spear and restrained the deceased and attacked him indiscriminately, with the result, the deceased fell down and died at the spot. With the above allegations, A1 to A5 were tried for the offences under Sections 148, 341 and 302 I.P.C. and ultimately, they were convicted for these offences. Hence, this appeal by all the accused.

2. The short facts leading to the conviction could be summarized as follows:
"(a) P.W.1 Thangavel is the younger brother of the deceased Balu alias Balachandran. P.W.2 Gopalakrishnan and P.W.3 Selvam were working under the deceased as farm servants. Both the accused and P.Ws.1 to 3 were residing in Thiruparayethurai village. The first accused is the uncle of the accused 2 to 4. Both the deceased and A2 to A4 belong to Mutharaiyar community. Sampath alias Sampath Kumar (A5) belongs to Harijan community.

(b) Out of enmity, Balu alias Balachandran and his brother Sathasivam murdered Thennarasu, the only son of the first accused on 11.7.1993 . On the complaint of A3 Karuppiah, who also sustained injury in the said incident, a case was registered. In that case, Balu alias Balachandran was arrested and later, he was released on bail. He came back home and attended on to his regular duties. The first accused along with others threatened the said Balu alias Balachandran that they would one day or the other kill him.

(c) The fateful occurrence took place at 10.30 a.m. on 23.4.1994.
The deceased Balachandran left his house and proceeded to his plantain grove. At a distance of 50 feet, P.W.1 Thangavel, his younger brother, also went behind him. At that time, the accused 1 to 5 appeared at the scene and restrained the deceased from proceeding further. A1 to A3 and A5 were armed with aruvals and A4 was armed with spear. On noticing that the accused coming near the deceased with the weapons, P.W.1 shouted asking the deceased to escape from the place. By that time, the accused began to attack the deceased. A1 Joser alias Ponnusamy gave a cut on the left leg, A2 Baskaran alias Baskar dealt cuts on the right elbow and right shoulder and A5 Sampath alias Sampathkumar gave a cut on the left thigh. On receipt of the injuries, the deceased fell down on the ground facing downwards. Again A1 Joser alias Ponnusamy gave a cut on the back of the head, A5 Sampath inflicted a cut on the back, A3 Karuppiah gave a cut on the right hand and A4 Murugan with spear stabbed on the middle of the back, left hip and nape. A4 Murugan gave a cut on the back of the right knee, again A1 Joser alias Ponnusamy gave repeated cuts on the wrist, hand and the fingers. At that time, P.W.2 Gopalakrishnan and P.W.3 Selvam also saw the occurrence. All the three witnesses raised an alarm and chased the accused to catch them. Carrying the weapons in their hands, the accused sped away. At the spot itself, the deceased died.

(d) P.W.1 immediately went to the police station and gave complaint Ex.P1 to P.W.10 Sub Inspector of Police at about 11.30 a.m. P.W.10 registered

the case under Sections 147, 148, 341 and 302 I.P.C. against all the five accused. He thereupon, sent Ex.P1 complaint and Ex.P1 8 F.I.R. to the Judicial Magistrate, Kuzhithalai. He also sent intimation to the Inspector of Police (P.W.12).

(e) Immediately, on receipt of the information, P.W.12, the Inspector of Police at about 12.00 noon came to the spot. He prepared observation mahazar Ex.P2 and rough sketch Ex.P19. He recovered blood stained earth and sample earth. He conducted inquest between 1.00 p.m. and 3.00 p.m. and examined P.Ws.1 to 4. The inquest report is Ex.P20. Thereupon, he sent the dead body with requisition Ex.P16 to the Doctor for post-mortem. P.W.9 Doctor conducted post-mortem on 23.4.1994 at 4.00 p.m. He found 19 injuries all over the body. He issued post-mortem certificate Ex.P17 giving opinion that the deceased would appear to have died of shock and haemorrhage due to multiple injuries sustained.

(f) P.W.12, the Inspector of Police on 28.4.1994 at 8.00 a.m. arrested A4 Murugan and in pursuance of his confession, he recovered aruval and spear. He came to know that A1 to A3 and A5 together surrendered before the Court at Pudukottai on 25.4.1994. Then, he applied for police custody and obtained the custody of all the accused on 11.5.1994. From A2, A3 and A5, aruvals were recovered on their confession. The aruval which was recovered from A5 was marked as M.O.3 and the aruval recovered from A3 was marked as M.O.4. Then, he sent the accused for remand. He sent requisition along with the material objects for getting the chemical analysis report. After completing the investigation, P.W.12, the Inspector of Police filed charge sheet against all the accused under Sections 148, 341 and 302 I.P.C.

(g) During the course of trial, the prosecution examined P.Ws.1 to 1 2, filed Exs.P1 to 25 and marked M.Os.1 to 8.

(h) The accused were questioned under Section 313 Cr.P.C. A1 alone filed a written statement stating that a false case had been foisted against him and others, since the complaint was given by A3 against the deceased Balachandran and Sathasivam in respect of the murder of his son and the evidence given by P.Ws.1 to 3 before the Court is false. A2 to A5 simply denied their complicity in the crime.

(i) Ultimately, the trial Court concluded that the prosecution case has been established beyond reasonable doubt and as such, the accused persons are liable to be convicted for the offences under Sections 148, 341 and 302 I.P.C."

3. Challenging the same, a common appeal has been filed before this Court by all the accused through a single counsel Mr.Rajkumar Roberts. During the pendency of the appeal, on behalf of the second appellant (A2), Mr.Sankarasubbu, the learned counsel has entered appearance and on behalf of the appellants 3 to 5 (A3 to A5), Mr.Padmanabhan, the learned counsel has entered appearance.

4. When the matter was taken up for final disposal, it was pointed

out by Mr.Rajkumar Roberts, the counsel for the first appellant(A1) that the first accused died in the jail itself and as such, the appeal gets abated as far as he is concerned. The learned Additional Public Prosecutor also would confirm the death of the first accused. In view of the above statement, the appeal as far as the first appellant (A1) is concerned gets abated.

5. Mr.Sankarasubbu, the learned counsel for the second appellant(A2) would submit that the evidence of P.Ws.1 to 3 as against the second accused is not consistent and at any rate, the second accused cannot be convicted for the offence under Section I.P.C., as there is no evidence to show that the second accused had caused the injury which is sufficient to cause death in the ordinary course of nature and as such, the second accused, if at all liable to be convicted, is only for the lesser offence on the basis of his individual overt act. He would cite the authorities in JAYARAJ v. STATE OF T.N. (1976 S.C.C. (Cri) 293) and CHILAMAKUR NAGIREDDY v. STA TEOF A.P. (1977 S.C.C. (Crl.) 562).

6. Mr. Padmanabhan, the counsel appearing for the appellants 3 to 5 (A3 to A5) would submit that there are various infirmities in the evidence of P.Ws.1 to 3, the eye witnesses, who are highly interested and as such, their evidence cannot be believed. Further, the presence of A4 at the scene of occurrence is doubtful, in view of the fact that P.W.1, the author of the F.I.R., has not mentioned the overt acts attributed to A4 and as such, A4 is liable to be acquitted. Ultimately, he would submit that even assuming that the case of prosecution is to be accepted, A3 to A5 cannot be convicted for the offence under Section 302 I.P.C., as there is no medical evidence to the effect that the injuries are sufficient to cause death in the ordinary course of nature. He would cite the decision in RAM JATTAN v. STATE OF U.P. (1995 S.C.C.(Cri) 169).

7. In reply to the said submissions, the Additional Public Prosecutor would justify the reasonings given by the trial Court for conviction and cite the judgment in KRISHNA MOCHI v. STATE OF BIHAR (2002 CRI.L.J.2645 (SC)).

8. We have assessed the inherent merits of the contentions urged by the counsel on either side and gone through the entire records.

9. At the outset, it requires to be stated that the fact that Thennarasu, the only son of the first accused Joser alias Ponnusamy was murdered on 11.7.1993 and with reference to the said murder, the third accused Karuppiah, who was also injured in that occurrence, gave a complaint against Balu alias Balachandran, the deceased in this case and his brother Sathasivam and consequently, they were arrested by the police has not been disputed. It is also not in dispute that Balu alias Balachandran was released on bail in the said murder case even at the stage of investigation and he came back to the village.

10. The grievance that the first accused had against the deceased over the murder of his son is that he came back to village on bail. The motive projected by the prosecution is that in retaliation to the murder of his son by the deceased and another, the first accused with the help of others

took revenge, which resulted in the attack of the deceased and his consequent death on 23.4.1994.

11. According to P.W.1 both in Ex.P1 complaint and his evidence, A1 Joser alias Ponnusamy along with the other accused had made arrangements to murder the deceased. P.W.1 would specifically state in his evidence that A1 threatened the deceased while he was in his house that he would murder him. In fact, A1 himself admitted in his statement under Section 313 Cr.P.C. that his son was murdered on 11.7.1993 by the deceased and his brother and consequently, a murder case was registered against them and as such, he had enmity against the deceased. P.W.12, the Inspector of Police also had stated in the crossexamination that the witnesses gave a statement to him during the course of investigation that A1 was trying to attack and murder the deceased. These things would clearly indicate that A1 had the motive to attack the deceased in retaliation to the murder of his son committed by him. Further, A2 to A4 are closely related to A1. Therefore, it can be safely held that the motive for the murder as projected by the prosecution has been clearly established.

12. To prove the occurrence, on the side of prosecution, P.Ws.1 to 3 have been examined. P.W.1 Thangavel is the younger brother of the deceased. P.Ws.2 and 3 were farm servants working under the deceased family.

13. According to P.W.1, on 23.4.1994 at 10.30 a.m., the deceased proceeded to his plantain grove and P.W.1 went behind him at a distance of 50 feet. At that point of time, A1 to A5 appeared at the scene with weapons in front of the deceased. P.W.1 sensing the danger cautioned the deceased asking to run away from the place. But, A1 Joser alias Ponnusamy without allowing the deceased to escape from the scene gave a cut with aruval on his leg. A2 Baskaran attacked him with aruval inflicting injury on the right elbow and shoulder and A5 Sampath alias Sampathkumar with aruval attacked on his left thigh. On receipt of these injuries, the deceased fell down. Then, A1 gave a cut on the back of the head, A5 attacked on the right hip and right hand, A4 Murugan with spear stabbed on the middle of the back, left hip and nape and A2 Baskaran attacked near the right knee. Again, A1 inflicted injuries on the hands indiscriminately.

14. This occurrence was witnessed by P.Ws.2 and 3, who came on their way to home after finishing their work. All the witnesses, P.Ws.1 to 3 tried to catch them, but the accused took to their heels with the weapons.

15. Immediately, P.W.1 went to the Jeeyapuram Police Station. P.W.1 0 Sub Inspector of Police received the complaint at 11.30 a.m. and registered the case against all the five accused and sent the complaint Ex.P1 and the F.I.R. Ex.P18 to the Court. Ex.P18 would show that the Judicial Magistrate, Kuzhithalai received the F.I.R. and the complaint on 23.4.1994 at about 1.00 p.m. In the said complaint, all the details of the occurrence have been mentioned. The names of the other two witnesses (P.Ws.2 and 3) have also been stated in Ex.P1.

16. It is true that P.W.1 is the brother of the deceased and P.Ws.2

and 3 were working as farm servants under the deceased and P.W.1. But, on that score, we cannot reject the evidence of P.Ws.1 to 3, if their testimony is otherwise reliable.

17. According to P.W.9, the Doctor, he found 19 injuries all over the body. The Doctor would state in his evidence that the injuries found on the body of the deceased as mentioned in Ex.P17 post-mortem certificate could have been caused by aruval and spear.

18. In these circumstances, the ocular testimony tendered by these witnesses, namely P.Ws.1 to 3, which is corroborated by the medical testimony cannot be said to be unreliable.

19. Even though it is stated by P.W.1 during the course of crossexamination that P.Ws.2 and 3 came afterwards, it is mentioned in Ex.P1 and in the chief examination of P.W.1 that they had also witnessed the occurrence and only on their shouting, the accused ran away from the scene with the weapons.

20. However, in respect of the part played by A4 Murugan, it is noticed that there is no consistency in the case of prosecution. According to the complaint Ex.P1, all the accused, except A4 who used spear (M.O.5), used aruval. As per Ex.P1, A4 with spear stabbed on the middle of the back, left hip and nape. Unfortunately, P.W.1 did not refer to the said overt acts in his evidence. Though he initially said that A1 to A3 and A5 were armed with aruvals and A4 with spear came to the scene, he did not choose to refer to the part played by A4 in his evidence, despite the fact that he said in Ex.P1 that A4 also stabbed the deceased with spear. It is true that P.Ws.2 and 3 would refer to the presence of A4 with spear at the scene and his infliction of injury on the deceased. But, there is no consistency in the overt acts attributed to A4 by P.Ws.2 and 3. According to P.W.2, A4 with spear stabbed on the back, right hip and nape, whereas it is stated by P.W.3 that A4 Murugan with spear stabbed only on the back. As per Ex.P1 7 post-mortem certificate, one punctured wound, 19th injury, is over the back of the chest and all the other injuries are cut injuries and incised injuries. Therefore, in the absence of the reference about the part played by A4 Murugan in the evidence of P.W.1, who is the author of the complaint, though a reference about his overt act has been made in the complaint, and in view of the contradiction between the evidence of P.Ws.2 and 3 with reference to the part played by A4 and in the light of the absence of the corresponding injuries on the respective parts of the body, we are constrained to hold that the presence of A4 and his causing injury with spear on the deceased is doubtful.

21. Furthermore, it is to be stated that A4 alone was arrested on 28 4.1994 and from him, aruval and spear were recovered in pursuance of his confession. When it is alleged that he had used only spear, there is no reason as to why P.W.12, the Inspector of Police had to recover both aruval and spear from him. Though it is mentioned in the mahazar that M.O.5 was blood stained spear, the Serologist's repeor shows that there was no blood. All the other accused together surrendered before the Judicial Magistrate,

Pudukottai on 25.4.1994 along with surrender petition. On obtaining police custody, aruvals (M.Os.3 and 4) were recovered on 11.5.1994.

22. It is to be pointed out in this context, A3 Karuppiah was the complainant in the earlier murder case which was given against Balachandran, the deceased in this case. A4 Murugan is admittedly the brother of A3. As stated by P.W.12, except A4, all the other accused together surrendered before the Judicial Magistrate, Pudukottai and filed surrender petition. As far as A4 is concerned, he did not choose to surrender, on the other hand, he was arrested by the police on 28.4.1994. In view of the above fact situation, we are unable to hold that the prosecution has established that A4 Murugan also participated in the occurrence.

23. However, in regard to the part played by the other accused, there is a consistent version by all the witnesses with reference to the overt acts attributed against each of them and we find corresponding injuries on the body of the deceased as per Ex.P17 post-mortem certificate. Though the witnesses would give account only for some of the injuries, they would clearly state that all the accused with the weapons gave cuts on different parts of the body of the deceased repeatedly (midtUk; khwp khwp btl;odh;;).

24. It was contended by the counsel for the fifth accused that P.W.1 stated that A5 used spear and attacked the deceased and as such, the same is against the prosecution. But, the reading of Ex.P1 and the evidence of P.Ws.2 and 3 would clearly show that A5 was using aruval and attacked the deceased on various parts of the body. P.W.12, the Inspector of Police also would state that fro m A5, M.O.3 aruval was recovered on 11.5.1994 in pursuance of his confession when he was under police custody. Therefore, the statement of P.W.1 with reference to the part played by A5 is purely a mistake. However, as noted above, we have taken into consideration the evidence of P.W.1 with reference to the absence of the part played by A4 and held that the presence of A4 at the scene of occurrence is doubtful.

25. As indicated earlier, the presence of P.Ws.2 and 3 cannot be suspected, in view of the fact that P.W.1 mentioned in Ex.P1, the earliest document in this case, that P.Ws.2 and 3 also saw the occurrence. Nothing has been elicited in their cross-examination that they speak falsehood against the accused.

26. Merely because the participation of A4in the crime has not been established, we cannot straightaway hold that the entire evidence adduced by all the three eye witnesses against other accused is to be rejected.

27. It is settled law that the non-acceptance of evidence tendered by the witnesses in some portion would not be the ground to throw out the entire prosecution case. The maximum "falsus in uno falsus in omnibus" (false in one thing, false in everything) has no application in India. Even if one portion of evidence is found to be deficient, in case other portion is sufficient to prove guilt of the accused, the conviction imposed upon the other accused can be maintained. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict

the accused notwithstanding the fact that the evidence has been found to be deficient to prove guilt of another accused.

28. In that view of the matter, it can be safely held that the evidence adduced by P.W.1 as against A1 to A3 and A5 is sufficient to hold their complicity in the crime, even though the evidence is deficient as against A4.

29. It was strenuously contended by Mr.Sankarsubbu, the counsel for A2 and Mr.Padmanabhan, the counsel for A3 to A5 that even assuming that the entire prosecution case is true as against the remaining accused, they cannot be convicted for the offence under Section 302 I.P.C. and they are liable only for their independent overt acts, especially when there is no evidence to show that the injuries caused on the deceased would be sufficient to cause death in the ordinary course of nature. They cited the decisions in RAM JATTAN v. STATE OF U.P.(1995 S.C.C.(Cri) 169), RAJARAM v. STATE OF M.P.(1994 S.C.C.(CrI) 889),JAYARAJ v. STATE OF T.N. (1976 S.C.C.(C ri) 293) and CHILAMAKUR NAGIREDDY v. STATE OF A.P.(1977 S.C.C.(Cri) 562).

30. The above decisions, in our view, would not be applicable to the present facts of the case. In 1994 S.C.C.(Cri) 889 (supra), the conviction under Section 302 read with 149 I.P.C. was modified into one under Section 326 read with 149 I.P.C. against 19 accused, in view of the fact that only one injury on the deceased was found to be fatal and rest of the injuries were only contusions and it was held in such circumstances, it could not be said that the common object of the unlawful assembly was to cause death.

31. Similarly, in 1995 S.C.C.(Cri) 169 (supra), it has been held that in the absence of proof by the prosecution in an objective manner that the injuries caused were sufficient in the ordinary course of nature to cause death, the same cannot be interfered with unless the injuries are so patent. In the said case, the opinion given by the Doctor is that death was due to shock and haemorrhage. So also, the Doctor did not find any injury to the vital organs. He found only fracture of 8th and 9th ribs. But, there were no corresponding external injuries. In the light of those facts and circumstances, it was held in that case that the act committed by the accused cannot come under Section 300 I.P.C. and as such, they could be convicted under Section 3 04 Part II read with Section 149 I.P.C.

32. In the decision in 1976 S.C.C.(Cri) 293 (supra) cited by the counsel for the appellants, it has been held that the prosecution did not elicit from the Doctor that the injuries on the deceased were sufficient to cause death in the ordinary course of nature and as such, the act of the appellants did not amount to murder. In that case, the deceased died after 9 or 10 days during which the deceased was operated upon in the hospital. In that context, it was held that it was not a murder.

33. In the same way, the Supreme Court in 1977 S.C.C. (Cri) 562 would hold that when the Doctor did not say that the injuries are fatal or sufficient in the ordinary course of nature to cause death, it could not be

said that the injuries are fatal and as such, the accused persons are not liable to be convicted for murder.

34. The facts of the present case stand entirely on a different footing. P.W.9, the Doctor gave opinion in Ex.P17 post-mortem certificate that the deceased died of shock and haemorrhage due to multiple injuries sustained. He also stated in his evidence that the injuries noticed on the deceased as found in Ex.P17 are necessarily fatal. Curiously, the Doctor has not at all been cross-examined by the defence. Therefore, the decisions rendered by the Supreme Court cited supra are clearly distinguishable from the facts of the present case.

35. Furthermore, the Supreme Court would say in 1995 S.C.C.(Cri) 169 (supra) cited by Mr.Padmanabhan, that if the injuries are so patent to conclude that the injuries are sufficient in the ordinary course of nature to cause death, then there is no reason to hold that it is not a murder.

36. In the light of the said principle, if we look at the injuries, it is so apparent that these injuries had been inflicted by the accused with common intention to cause death of the deceased. The injuries are as follows:
1)A transverse cut wound over left hand dorsum, size 5cm x 2cm x exposing muscles and bones.
2)A transverse cut wound over left hand palm, size 5cm x 2cm x exposing muscles and bones.
3)A transverse cut wound over right hand index thumb size 3cm x 1/2 cm x exposing muscles and bones.
4)A transverse cut wound over right elbow back size 10cm x 5cm x 2cm, fracture elbow joint present.
5)A small cut wound over right eyebrow lateral and size 2cm x 1/2cm x 1/2cm.
6)A deep transverse cut wound over occipito-parietal region of scalp right side size 15cm x 3cm x exposing muscles, bones and brain matter.
7)A oblique deep cut wound over temporo-parietal region of scalp right size 15cm x 5cm x exposing bones and brain matter.
8)A transverse cut would over occipito-temporal region of scalp right size 15cm x 3cm x exposing bone and brain matter.
9)A transverse cut wound over right shoulder back size 3cm x 1/2cm x 1/2cm.
10)A transverse cut would over right shoulder back size 3cm x 1/2cm x 1/2cm, below wound No.9.
11)A deep transverse cut wound over right side back of the chest in the middle size 5cm x + cm x muscle deep.
12)A deep transverse cut wound over right upper arm middle size 4cm x 2cm x 1cm.
13)A transverse cut wound over left leg lower 1/3rd above ankle size 5cm x 1cm x 1/2cm.
14)A deep cut wound transverse over left thigh middle size 15cm x 5 cm x exposing muscles and bones.
15)A transverse cut wound over right forearm middle size 4cm x 1/2cm x muscle depth.
16)A linear abrasion over right knee back size 5cm x 1/4cm.
17)A deep spindle shaped incised wound over left loin size 3cm x 1cm x 2cm.
18)A spindle shaped incised wound over back of the neck size 4cm x 1 cm x 2cm.

19)A punctured wound over back of the chest at 11th thoracic vertebra size 2cm x 1/2cm x 2cm muscle deep.
The nature of the injuries, according to P.W.9 Doctor, is necessarily fatal.

Furthermore, the perusal of the injuries would clearly reveal that very heavy cuts had been dealt on the vital organs of the body. Admittedly, the deceased died at the spot.

37. In such circumstances, it can be safely held that all the accused came with dangerous weapons with intention to commit the murder of the deceased and sharing the said common intention, they inflicted all these injuries.

38. It is true that the trial Court convicted the accused only under Section 302 I.P.C. simpliciter. On perusal of the charges framed against the accused , it is noticed that the third charge was framed against the accused under Section 302 I.P.C. simpliciter, but in the charge, it has been specifically stated that all the accused came with common intention to commit the murder of the deceased and then attacked the deceased, who died at the spot.

39. The omission to add Section 34 in the charge is purely a mistake, in view of the fact that the wordings regarding the common intention would contain in the said charge. It is true that Section 302 I.P.C. simpliciter would not be the proper charge of conviction against the accused, since the accused 1 to 3 and 5 participated in the occurrence with common intention.

40. It is settled law as laid down by this Court as well as the Apex Court, this Court can invoke Section 34, even though trial Court convicted them only for Section 302 simpliciter, and convict them thereunder. Accordingly, we modify the conviction under Section 302 I.P.C. simpliciter into Section 302 read with 34 I.P.C. and sentence them to undergo imprisonment for life and to pay a fine of Rs.500/- as imposed by the trial Court.

41. With reference to the offence under Section 148 I.P.C., it shall be held that the said offence cannot be said to be made out, in view of our finding in the earlier paragraphs that the presence of one of the accused, namely A4 out of the five accused is doubtful. Consequently, A2, A3 and A5 are liable to be acquitted in respect of the offence under Section 148 I.P.C.
42. In regard to conviction under Section 341 I.P.C., it is to be found that there are materials that the deceased was restrained by the accused when he was proceeding towards his plantain grove. Therefore, the conviction under Section 341 I.P.C. and sentence imposed by the trial Court are liable to be confirmed.
43. Therefore, none of the grounds urged by the counsel for the parties,in our view,would be sufficient to hold that the prosecution case is untrue as against A1 to A3 and A5.
44. In this context, we are constrained to refer to one more question which has been raised by Mr. Sankarasubbu, the learned counsel for the second accused. After his arguments were over with reference to the merits of the

case, he pointed out that on behalf of A2, he filed an application before the Registry requesting this Court to take additional evidence for the purpose of fixing the age of the second accused as he has got the material to show that on the date of offence, i.e. on 23.4.1994, he was less than 18 years old and as such, he should have been treated as juvenile and consequently, in order to establish that the conviction imposed upon the second accused by the trial Court without following the procedure relating to juvenile accused will become vitiated. Accordingly, we permitted him to raise the ground and directed the Office to number the application and bring it before this Court. Ultimately, the same was numbered as Crl.M.P.No.235 of 2003 in C.A.No.1051 of 1998, which is purported to have been filed under Section 391 read with 482 Cr.P.C.

45. Admittedly, there is no affidavit filed by the second accused, but the counsel merely filed the petition stating that on the date of occurrence, i.e. on 23.4.1994, the petitioner/second accused was less then 18 years and his plea for fixation of age had not been properly considered and the rules relating to the fixing age laid down by the Supreme Court in 1984 S.C.C. (Cri) 478 and 1998 S.C.C. (Cri) 125 were not followed and in the light of the certificate relating to the birth of the petitioner, his age has to be fixed by allowing to let in additional evidence in order to show that the conviction without following the procedure relating to juvenile is illegal. Along with the petition, he has produced a birth certificate purported to have been issued by the Joint Registrar Office dated 16.12.2002 to the effect that a male child was born on 26.12.1976 to Kannan Muthiriyar and Rukmani.

46. The reading of the petition filed by the counsel even without an affidavit sworn to by the party and the birth certificate produced before this Court would show that the prayer of the counsel for the petitioner is that his plea for fixation of age was not earlier considered properly and he has now produced the birth certificate which would show that he was less than 18 years on the date of occurrence and therefore, opportunity must be given to prove that he was a juvenile on the date of occurrence.

47. In paragraph 2 of the petition in Crl.M.P.No.235 of 2002, it has been specifically stated that his plea for fixation of his age was not properly considered. This would indicate that the said plea had been earlier raised before the trial Court or before this Court and the same was not properly considered. Before considering the merits of the prayer relating to the fixation of age, it has to be stated that the above statement is factually incorrect and misleading.

48. The original records would show that when the petitioner/second accused gave confession on 11.5.1994, he mentioned in his statement that his age was 20 years. The charge sheet was filed on 7.11.1995, which was taken on file by the committal court. In that, it was mentioned that the age of the petitioner was 20 years. The Committal Court committed all the accused on 3.7.1997 to the Sessions Court for trial. At that time, no question has been raised with reference to age. Even during the course of trial, either while framing the charges against the accused or when questioning the accused under Section 313 Cr.P.C., the petitioner (A2) never made any plea for fixing his age. When he was questioned under Section 313 Cr.P.C., he mentioned his age as 22 years. Even during the arguments before the trial Court, the counsel on behalf of the accused never made a plea with reference to the age of the second accused. The conviction was imposed by the trial Court on 4.11.1998.

In the judgment, it was mentioned that the age of the second accused is 22 years. Challenging the conviction, the appeal has been filed on 7.1.1998. No ground has been raised with reference to the plea of his age in the appeal grounds.

49. The first bail application was filed by the petitioner (A2) through the counsel Mr.Rajkumar Roberts in Crl.M.P.No.10538 of 1998. In the said application, no such plea has been raised, on the other hand, it was mentioned that his age was 22 years. The bail application was dismissed on 12.1.1999. The second bail application was filed in Crl.M.P.No.4057 of 1999 by the second accused through the present counsel Mr. Sankarasubbu. In that application also, the age was mentioned as 22 years. No plea has been raised with regard to the fixation of his age. The said application was dismissed on 2.7.1999. The third application was filed by Mr. Sankarasubbu, the present counsel for the second accused in Crl.M.P.No.4896 of 2001. Even in the said application filed in 2001, the age of the petitioner Baskaran was mentioned as 22 years. Admittedly, the said question had not been raised in the said application. The application was ultimately dismissed on 31 .7.2001. Now, the present application in Crl.M.P.No.235 of 2003 requesting opportunity to let in additional evidence regarding the fixation of age of the petitioner as he was a juvenile on the date of occurrence, has been filed only on 6.1.2003 when the main appeal itself has been listed for final disposal before this Court.

50. As indicated above, this belated application even without an affidavit by the party has been filed mentioning that his plea made earlier was not properly considered. But, it is not true. As a matter of fact, on perusal of the original records relating to the committal proceedings, it is seen that the second accused himself, while surrendered along with the other accused before the Judicial Magistrate, Pudukottai on 25.4.1994 through the Advocate, mentioned his age as 20 years. The said surrender petition would contain the signatures of all the accused including the second accused. Thus, it is clear that he never pleaded before any forum including this forum that he was a juvenile on the date of occurrence and as such, he cannot be tried along with the other adult persons and on the other hand, he himself stated on 25.4.1994 in the surrender petition filed before the Magistrate that his age was 20 years. Therefore, the statement of the counsel in the present petition that his plea for fixation of age earlier made was not properly considered is nothing but a misstatement.

51. Let us now come to the issue relating to the fixation of age.

52. According to the counsel for the petitioner (A2), he was less than 18 years old on the date of occurrence i.e. on 23.4.1994 and therefore, the trial ought to have been conducted treating the petitioner as juvenile and failure to follow the said procedure would vitiate the trial.

53. The counsel would cite the decision in GOPINATH GHOSH v. STATE OF W.B. (1984 S.C.C. (Cri) 478). This is a case where the accused for the first time raised the contention before the Supreme Court that he was juvenile on the date of occurrence. Entertaining the said contention, the Supreme Court ordered enquiry for fixing the age of the accused. On the report, the Supreme Court found that the accused was aged below 18 and held that the entire trial was without jurisdiction and vitiated and remanded the matter to the Magistrate for disposal by following the procedure relating to Juvenile Justice Act.

54. He would also cite the authority in BHOLA BHAGAT v. STATE OF BIHAR (1998 S.C.C. (Cri) 125), wherein the Supreme Court followed the said view and held that the sentence imposed upon the juvenile was liable to be set aside. In the above case, the plea regarding the age was raised in the trial Court and in Section 313 Cr.P.C. statement, the trial Court recorded the age of the accused 2,3 and 10 as 17 years, 21 years and 18 years and when the alleged occurrence had taken place in September 1978, all the three accused were below 18 years. In the light of the above facts of the case, the Supreme Court found some material available on record in Section 313 questioning to show that they were juvenile on the date of occurrence.

55. Both these judgments would not be applicable to the present facts of the case for the reason that 1984 S.C.C.(Cri) 478 would relate to the West Bengal Children Act and 1998 S.C.C.(Cri) 125 would relate to the Bihar Children Act. Under these Acts, the definition of ' juvenile' would indicate the person who has not attained 18 years.

56. In these cases, the Juvenile Justice Act, 1986 was not considered as the same came into force with effect from 2.10.1987. By this Central Act (Act No.53 of 1986), the Children Acts of various States including the Tamil Nadu Children Act, Bihar Children Act and West Bengal Children Act have been repealed. Under this Act, as per Section 2(h), "juvenile means a boy who has not attained the age of sixteen years .

57. In the instant case, the occurrence had taken place on 23.4.1994 Even according to the petitioner through this petition on the strength of the birth certificate produced before this Court, he had completed 16 years and he was running 17 years and 4 month on the date of occurrence as his date of birth was mentioned as 26.12.1976. Therefore, it cannot be contended that the trial Court has failed to fix the age of the second accused correctly and as such, the entire trial is vitiated.

58. Admittedly, on the date of occurrence, he was not a juvenile, even assuming that the date of birth given by the petitioner through this petition accompanied by birth certificate is to be accepted as true. However, it could be recalled that the petitioner himself, as indicated above, mentioned in the surrender petition filed on 25.4.1994 before the Judicial Magistrate that his age was 20 years. Therefore, the decisions cited by the counsel for the petitioner would not help in any way.

59. In this context, it would be worthwhile to refer to the judgment in RAMDEO CHAUHAN v. STATE OF ASSAM (2001 S.C.C. (Cri) 915), wherein the Supreme Court through majority view refused to review the order confirming the conviction and sentence holding that the accused was held to be not a juvenile and he was aged above 16 years by referring to the provisions of the Juvenile Justice Act, 1986, which would apply in all fours to the present facts of the case. As a matter of fact, the Supreme Court in the said decision would refer to the decisions cited supra, namely 1984 S.C.C.(Cri) 478 and 1998 S.C.C. (Cri) 125 .

60. Some of the observations made by the Supreme Court in the said decision would be relevant in this context:

"A perusal of the record shows that during the investigation, enquiry and trial, though represented by Senior Counsel, no plea was ever raised regarding the petitioner being a juvenile and the case being governed by the provisions of the Act. Only at the time of arguments, plea regarding the accused being juvenile was raised on the basis of defence evidence. ....

Even in his application for grant of bail under Section 437 of the Code, the petitioner had not raised the plea of being under the age of 16 years entitling him to bail. Neither in his confessional statement recorded by the Magistrate, nor in the memo of appeal filed in the High Court, such plea was ever raised. ..... A harmonious reading of the Act, particularly Section8 and Section 2 7 of the Code would lead us to hold that whenever any delinquent juvenile accused of an offence, irrespective of the punishment imposable by law, is produced before a Magistrate or a court, such Magistrate or the court, after it is brought to its notice or is observed by the Magistrate or the court itself that the accused produced before it was under the age of 16 years, shall refer the accused to the Juvenile Courts if the Act is applicable in the State. .... There is no doubt in our mind that the plea of the petitioner being a juvenile is not only an afterthought but a concoction of hi9s imagination at a belated stage to thwart the course of justice by having resort to wrangles of procedures and technicalities of law. .... If such type of incredible evidence is allowed, in many cases the accused will come up with such plea and thereby rendering our justice system ineffective and also eroding the credibility of the system. .... The efforts made by the accused by way of this petition, are not likely to advance the interests of justice, but on the contrary frustrate it."

61. In the light of the above observations, we are constrained to reject this application on the ground that there is no merit in the contention with reference to the age and even assuming that the age is accepted to be true, we cannot conclude that the petitioner/ second accused was held to be a juvenile on the date of occurrence, i.e. on 23 .4.1994 as per the definition of the term "juvenile" contained in Section 2(h) of the Act.

62. When we express this view to the counsel Mr. Sankarasubbu, he would cite the decision in RATTAN LAL v. STATE OF PUNJAB (1965 M.W.N.CR.65), wherein the Supreme Court applied Section 6 of the Probation of Offenders Act in respect of an accused who was convicted by the trial Court even before the said Act was extended to its area. On the strength of this decision, he would submit that the term "juvenile" has been redefined under Juvenile Justice (Care and Protection of Children) Act, 2000 to mean that a person who has not completed 18 years of age and though this Act has come into force on 20.12.2000, retrospective effect can be given.

63. This contention is quite untenable. Admittedly, the date of occurrence, the period of trial and the date of conviction were only during the period in which the Juvenile Justice Act, 1986 was in force. In other words, the Committal Magistrate as well as the trial Court has to follow the procedures contemplated in the Act, 1986.

64. In the judgment of the supreme Court reported in 1965 M.W.N. CR.65 (supra), the benefit conferred by the Probation of Offenders Act was given to the accused by the appellate Court in view of Section 11(1) of the said Act providing an appellate Court or a revisional Court can make an order under the Act, which means that it can make an order also under Section 6(1) of the Act. As such, the retrospective effect has been given by the Supreme Court in the light of the wordings contained in Section 11(1) of the Act. That would not apply to the case on hand.

65. It can never be stated that definition of the word as contained in Section 2(h) of the Act, 2000 should be given retrospective effect giving the benefit to the accused who committed the offence when the Act, 1986 was in

force. In short, it shall be stated that retrospective effect can be given for sentence on conviction or applicability for Probation of Offenders Act in the light of the wordings contained in the new Act, but the retrospective effect cannot be extended to the definition of the term "juvenile" in the absence of any indication in the present Act.

66. Lastly, a faint attempt has been made that the appellant (A2) being an adolescent offender can be detained only in Borstal School and cannot be sentenced to imprisonment for life on the strength of the decision in RAMASAMY v. STATE (2000(1) MWN (Cr.)131).

67. This contention also, in our view, is untenable. Section 10-A of the Madras Borstal Schools Act, 1925 would provide for sending the adolescent offender when he was below 21 years on the date of conviction. But, in this case, the second accused himself mentioned in the surrender petition that he was aged 20 years in the year 1994. It is also not disputed that on the date of conviction, he was above 21 years of age. Moreover, the question of sending him to Borstal School, at this stage, does not arise, because admittedly, he is above 25 years.

68. In view of the above discussion, all the contentions urged by the counsel are rejected.

69. To sum up: The conviction under Section 302 I.P.C. imposed upon the appellants 2,3 and 5 (A2, A3 and A5) is modified into one under Section 302 read with 34 I.P.C. and they are sentenced to undergo imprisonment for life and to pay a fine of Rs.500/-, in default to undergo R.I. for six months and the conviction and sentence imposed on A2, A3 and A5 by the trial Court under Section 341 I.P.C. are confirmed and the conviction and sentence under Section 148 I.P.C. imposed upon them are set aside. The conviction and sentence imposed on the fourth appellant (A4) are set aside and he is acquitted of all the charges.

70. In fine, the appeal in respect of the first appellant (A1) is dismissed as abated, the appeal in regard to the appellants 2,3 and 5(A2, A3 and A5) is dismissed with the above modification and the appeal as regards the fourth appellant (A4) is allowed setting aside the conviction and sentence imposed upon him and he is directed to be set at liberty forthwith, unless he is required in any other case. Crl.M. P.No.235 of 2003 to let in additional evidence is dismissed.

Index: Yes
Internet:Yes

To

1) The II Additional Sessions Judge, Tiruchirapalli.
2) -do- through the Prl. Sessions Judge, Tiruchirapalli.
3) The Superintendent, Central Prison, Tiruchirapalli.
4) The Inspector of Police, Jeeyapuram Police Station, Tirchirapalli.
5) The Public Prosecutor, High Court, Madras.
6) The District Collector, Tiruchirapalli.
7) The Director General of Police, Chennai.